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12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON
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12 R.W., individually and on behalf of his
13 marital community,

14 Plaintiff,

15 v.

16 COLUMBIA BASIN COLLEGE, a
17 public institution of higher education,;
18 REBEKAH WOODS, in her official
19 capacity; and RALPH REAGAN, in his
20 individual and official capacities,

21 Defendants.

Cause No. 4:18-cv-05089-MKD

MOTION FOR PARTIAL
SUMMARY JUDGMENT

22 COMES NOW, R.W., by and through his attorneys, and moves the Court to
23 determine that Defendants are liable for violation of R.W.'s First Amendment rights
24 as a matter of law. This motion is brought pursuant to Fed. R. Civ. P. 56 and is
25 supported by the record herein.



**I. SUMMARY OF THE ARGUMENT AND REQUESTED
DETERMINATION ON SUMMARY JUDGMENT**

There has been a substantial amount of argument before this Court in prior motion practice in the past six years. *See e.g. ECF No. 31; ECF No. 36; ECF No. 128; ECF No. 135; ECF No. 285; ECF No. 293.* The matter has twice been argued before the Ninth Circuit. Counsel for R.W. does not intend through the content of this motion to unnecessarily repeat arguments that the Court is familiar with. The framework of liability in this matter is straightforward. It is undisputed that R.W. only engaged in speech and did not engage in any conduct in furtherance of his violent ideations. It is also undisputed that Defendants sanctioned R.W. based on this speech to his medical providers. To avoid liability for violation of R.W.'s First Amendment rights, Defendants would need to be able to demonstrate one of two things:

1. That R.W.'s speech is not protected under the First Amendment; or
2. Defendants' finding of misconduct by R.W. and imposition of sanctions upon R.W. does not constitute adverse action.

A conclusion as to the second prong would require the Court to ignore the finding of misconduct by the Student Conduct Officer and the regulatory framework



1 under Wash. Admin. Code § 132S-100 (2016).¹ Such a conclusion would further
2 require the Court to upend innumerable cases in the fields of student speech,
3 employment discrimination, public employee speech, and prisoner speech to reach
4 the conclusion that the finding of misconduct and imposition of sanctions does not
5 constitute adverse action. A conclusion that R.W.'s speech to his medical providers
6 is unprotected is no less worrisome.
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9 To the extent that the Court does not conclude liability as a matter of law on
10 both elements, R.W. requests the Court at least conclude that Defendants' finding
11 that R.W. violated the student code of conduct and imposition of sanctions
12 constitutes adverse action for the purposes of the First Amendment analysis.
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14 II. FACTS

15 R.W. was a student enrolled at the nursing program at Columbia Basin
16 College (CBC) in the Winter Quarter of 2017 and was in good standing. *ECF No.*
17 *37-34, pgs. 5-6.* In February of 2017, R.W. saw an increase in the frequency of his
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20 ¹ In preparing this motion, counsel for R.W. discovered that Wash. Admin. Code §
21 132S-100 was substantially revised effective January 9, 2020, after the incidents
22 giving rise to this case occurred. Wash. St. Reg. 20-03-046. As the incident giving
23 rise to this matter occurred in March of 2017, the prior code provisions are
24 controlling.
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1 epileptic seizures which he attributed to stress. *ECF No. 37-24, pg. 5; ECF No. 37-*
2 *12, pg. 1.* These symptoms led to R.W. experiencing trouble sleeping and insomnia.
3 *Id.* On February 28, 2017, R.W. contacted his primary care physician Dr. Michael
4 Cabasug because R.W. was having trouble with insomnia and was having violent
5 thoughts regarding his instructors at CBC. *ECF No. 37-12, pg. 1; ECF No. 37-22,*
6 *pg. 10.* R.W. was scheduled for an appointment on March 6, 2017. *ECF No. 37-24,*
7 *pg. 5.* From February 28, 2017 to March 6, 2017, R.W. attended classes at CBC
8 with no issues and did not mention these thoughts to anyone at CBC or elsewhere.
9 *ECF No. 37-12, pg. 1; ECF No. 37-8, pgs. 6; 14; ECF No. 37-25, pg. 1; ECF No.*
10 *37-26, pg. 3.*

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14 R.W. met with Dr. Cabasug on March 6, 2017 and informed his physician of
15 his thoughts about hurting his instructors. *ECF No. 37-12, pg. 1; ECF No. 37-24,*
16 *pg. 5.* While at Dr. Cabasug's office, R.W. met with a representative of Lourdes and
17 thereafter voluntarily admitted himself to Lourdes Transition Center for inpatient
18 mental health treatment. *Id; ECF No. 37-27, pgs. 3-4.*

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20 When CBC learned of R.W.'s speech with his medical providers, in
21 commenced disciplinary proceedings against R.W. for violation of the student code
22 of conduct. On April 20, 2017, Reagan issued decision that "found [R.W.]
23 responsible for violating [CBC's] policy on Abusive Conduct (WAC 132S-100-
24 205)." *ECF No. 37-16, pgs. 1-2.*
25



WAC 132S-100-205 Abusive conduct.

Physical and/or verbal abuse, threats, intimidation, harassment, online harassment, coercion, bullying, cyberbullying, retaliation, stalking, cyberstalking, and/or other conduct which threatens or endangers the health or safety of any person or which has the purpose or effect of creating a hostile or intimidating environment.

ECF No. 37-16, pgs. 1-2. In making this finding, Reagan explained the violation as follows:

As per our conversation at the meeting, you explained that you had homicidal thoughts due to stress and lack of sleep with the possibility of medication being a factor. When you had homicidal thoughts you immediately contacted your primary care doctor because you were concerned. Your doctor recommended that you go to Crisis Response and you were voluntarily admitted to Lourdes. I understand that the result of your behavior was not to create a hostile or intimidating environment, but it had the same effect. Therefore you are found responsible for violating our policy on Abusive Conduct.

Id. The decision imposed sanctions against R.W. requiring R.W. to give permission to Reagan to speak with R.W.'s counselors, prevented R.W. from re-enrolling at the college until after October 2017, and maintaining his trespass in regard to the Richland campus until in re-enrolled at the college. The decision was upheld by CBC President Lee Thorton as the final decisionmaker. *ECF No. 37-20, pgs. 1-4; Wash. Admin. Code § 132S-100-415(5)(c)(iii) (2016).*

As a consequence of the disciplinary process, R.W. was failed in each of his classes for the Winter 2017 quarter. *ECF No. 139, pgs. 2-3.* Per the nursing program rules, as R.W. had a previous absence from the program, he would need to reapply for admission to the nursing program and restart the program from the beginning.



1 *ECF 47-12, pg. 2; ECF No. 139, pgs. 2-3.* When R.W. sought confirmation that this
 2 was the case, Reagan declined to answer R.W.’s question after Reagan consulted
 3 with CBC’s vice presidents. *ECF No. 47-12, pgs. 1; 3.* Mary Hoerner and later
 4 President Rebekah Woods both confirmed that only the president of CBC would
 5 have the authority to override the nursing program provisions. *ECF No. 34, pg. 2;*
 6 *ECF No. 133, pg. 3.* President Woods explicitly stated that she had not chosen to
 7
 8 override these provisions declined to commit to doing so. *ECF No. 133, pg. 3.*
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10 III. ARGUMENT

11 A. The Imposition Of Sanctions As “Disciplinary Action” On 12 R.W. Constitutes Adverse Action Based On His Speech In 13 Violation Of The First Amendment.

14 The Court should conclude that Defendants’ finding R.W. engaged in
 15 misconduct and the imposition of sanctions R.W. constitutes adverse action for the
 16 purposes of the First Amendment. Except in the cases of “well-defined and narrowly
 17 limited classes of speech,” content-based regulation of speech by government actors
 18 is presumptively unconstitutional. *Chaplinsky v. New Hampshire*, 315 U.S. 568,
 19 571–572 (1942); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This puts
 20 Defendants in a bind as there is no dispute that the basis for the finding of misconduct
 21 and imposition of sanctions on R.W. was based on the content of his speech. *Eisinger*
 22 *Decl. at Exhibit P, ECF No. 37-16, pgs. 1-2.* Perhaps recognizing that the
 23 categorization of R.W.’s speech as unprotected is a daunting task, Defendants have
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1 shifted to a theory that a finding of misconduct and imposition of sanctions isn't
2 adverse action. *ECF No. 285, pg. 5.*

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4 This theory does not work in the context of the regulatory framework
5 governing the student conduct process at CBC and it does not work in the context of
6 First Amendment case law. Analysis of what constitutes adverse action in regard to
7 protected First Amendment speech usually arises from retaliation claims, often
8 based on public employment or student discipline. "The precise nature of the
9 retaliation is not critical to the inquiry in First Amendment retaliation cases. The
10 goal is to prevent, or redress, actions by a government employer that 'chill the
11 exercise of protected' First Amendment rights." *Coszalter v. City of Salem*, 320 F.3d
12 968, 974–75 (9th Cir. 2003) (citing *Rutan v. Republican Party*, 497 U.S. 62, 73
13 (1990)). A school suspending a student from the basketball team is adverse action.
14 *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006). Imposing a
15 12-hour notice rule on a state legislator before coming to the state capitol may be an
16 adverse action. *Boquist v. Courtney*, 32 F.4th 764, 777 (9th Cir. 2022). Maintaining
17 records of sanctions in a student's records is adverse action. See *LaVine v. Blaine*
18 *Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001). Only the most minor of actions such
19 as "counseling-only chronos" issued to prisoners for "minor misconduct recurs after
20 verbal counseling or if documentation of minor misconduct is needed" and that carry
21 no disciplinary consequences fall below the threshold of adverse action. *Jenkins v.*
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1 *Caplan*, No. C 02-5603 RMW PR, 2010 WL 3742659, at *2 (N.D. Cal. Sept. 16,
2 2010) (unpublished).

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4 In addition to the case law, CBC's own regulations make it undeniable that
5 the student code of conduct process is a disciplinary process. The only jurisdiction
6 of the Student Conduct Officer and the Student Code of Conduct is to engage in
7 "disciplinary action." Wash. Admin. Code § 132S-100-200 (2016). "Disciplinary
8 action" is "[t]he sanctioning of any student pursuant to WAC 132S-100-430 for the
9 violation of any designated rule or regulation of the college, including rules of
10 student conduct, for which a student is subject to adverse action." Wash. Admin.
11 Code § 132S-100-030 (2016). The student conduct process only provides for three
12 outcomes: (1) termination of the proceedings; (2) imposition of "disciplinary
13 sanctions as provided herein"; or (3) referral to the student conduct board. Wash.
14 Admin. Code. § 132S-100-400(4) (2016). The face of April 20, 2017 letter makes it
15 clear that the decision's finding of misconduct and imposition of sanctions falls
16 under Wash. Admin. Code § 132S-100-400(4)(a)(ii).
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20 The sanctions permissible upon a finding a student violated the student code
21 of conduct are set forth in Wash. Admin. Code. § 132S-100-430 (2016):
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23 The following sanctions may be imposed upon any student found to
24 have violated the student code of conduct:

25 (1) Warning. [...]

(2) Reprimand. [...]

(3) Loss of privileges. Denial of specified privileges for a designated
period of time.



1 (4) Restitution. [...]

2 (5) Discretionary sanctions. Work assignments, essays, service to the college, or other related discretionary assignments.

3 (6) Disciplinary probation. Formal action placing conditions upon the student's continued attendance for violations of college rules or regulations or other failure to meet the college's expectations within the student code of conduct. Written notice of disciplinary probation will specify the period of probation and any condition(s) upon which his/her continued enrollment is contingent. Such conditions may include, but not be limited to, adherence to terms of a behavior contract or limiting the student's participation in extra-curricular activities or access to specific areas of the college's facilities. Disciplinary probation may be for a specified term or for an indefinite period which may extend to graduation or other termination of the student's enrollment in the college.

11 (7) Suspension. Separation of the student from the college for a definite period of time, after which the student is eligible to return. Students who are suspended may be denied access to all or any part of the campus or other facilities during the duration of the period of suspension. Additionally, conditions for readmission may be specified.

14 (8) Expulsion. Permanent separation of the student from the college. Students who are expelled may be denied access to all or any part of the campus or other facilities permanently.

16 (9) Revocation of admission and/or degree. [...]

17 (10) Withholding degree. [...]

18 (11) Professional evaluation. Referral for drug, alcohol, psychological or medical evaluation by an appropriately certified or licensed professional may be required. The student may choose the professional within the scope of practice and with the professional credentials as defined by the college. The student will sign all necessary releases to allow the college access to any such evaluation. The student's return to college may be conditioned upon compliance with recommendations set forth in such a professional evaluation. If the evaluation indicates that the student is not capable of functioning within the college community, the student will remain suspended until future evaluation recommends that the student is capable of reentering the college and complying with the student code of conduct.

25 (12) Delayed suspension. A probationary amount of time set by the SCO, SCB, SAB, or president in which the student must remain on good terms with the student code of conduct. If the student is found



1 responsible for violating the student code of conduct while still under
 2 the delayed suspension guidelines, then the student will be suspended,
 3 as set forth in subsection (7) of this section, for their next violation of
 the student code of conduct.

4 At no point have Defendants argued that the Reagan's finding that R.W.
 5 violated the student code of conduct or his imposition of sanctions on R.W. were
 6 *ultra vires* or beyond his jurisdiction as the student conduct officer. As R.W. has set
 7 forth before, the sanctions imposed on R.W. meets the definition of a suspension in
 8 Wash. Admin. Code. § 132S-100-430. The Ninth Circuit recognized that "officials
 9 have thus effectively expelled R.W. from the nursing program regardless of their
 10 chosen terminology." *R. W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1226 (9th Cir.
 11 2023). As a matter of law, R.W. was subjected to adverse action based on his speech.
 12 As a result, the Court should grant the motion for summary judgment establishing
 13 liability.
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17 **B. The Student Speech Doctrine Does Not Apply To Higher**
 18 **Education And *Oyama*'s Framework Regarding Pedagogical**
 19 **Speech In Conjunction With Student Teacher Placement Is**
Inapplicable To R.W.'s Off-Campus To His Medical Providers.

20 The Court should conclude that the substantial disruption test for student
 21 speech does not apply in higher education. The framework has not been adopted by
 22 the Ninth Circuit despite repeated invitations to do so. *Brown v. Li*, 308 F.3d 939
 23 (9th Cir. 2002); *Oyama v. Univ. of Hawaii*, 813 F.3d 850 (9th Cir. 2015). The
 24 Supreme Court has explained that this doctrine arises from the school serving as *in*
 25



1 *loco parentis* on behalf of minor students. *Mahanoy Area Sch. Dist. v. B. L. by &*
2 *through Levy*, 141 S. Ct. 2038, 2045 (2021). The doctrine of *in loco parentis* does
3 not apply when the person is an adult. *See Planned Parenthood of Cent. Missouri*
4 *v. Danforth*, 428 U.S. 52, 75 (1976).

6 Notwithstanding these subsequent cautions from the Supreme Court,
7 Defendants continue to argue that the decision in *Oyama* allows CBC to punish R.W.
8 for his speech. *ECF No. 285, pgs. 16-18*. It does not. *Oyama* is about curricular
9 speech undertaken in response to classroom activities. *Oyama*, 813 F.3d at 856. In
10 one assignment, Oyama expressed his opinion that online child predation should be
11 legal. *Id.* When his instructor asked Oyama about this, Oyama acknowledged that
12 he would be required to report such activities under state law and that he would do
13 so, but believed that it would be fine for a twelve-year-old student to have a
14 consensual relationship with a teacher. *Id.* In a separate classroom discussion,
15 Oyama stated that he did not believe there were benefits for mentally disabled
16 students to be included in regular classrooms. *Id.* at 856-57. In response to a related
17 assignment, Oyama wrote that 90% of the special education students he encountered
18 were fakers, and doubted that such disabilities were medically-based neurological
19 decisions. *Id.* at 857. In conjunction with these statements, Oyama was also rated as
20 providing an unacceptable performance on his field experience evaluation forms. *Id.*



1 As a result of these matters, Oyama’s application into the student teaching program
2 was denied. *Id.*

3
4 Despite the clear curricular nature of these statements, the Ninth Circuit
5 nevertheless decided that the Supreme Court’s decision regarding pedagogical
6 speech would not be extended into higher education. *Id.* at 864-65. Instead, the court
7 upheld the denial as part of the certification decisions based on defined professional
8 standards. *Id.* at 866-67.

9
10 In arguing that this is analogous to the sanctions imposed on R.W., Defendants
11 argue that the punishment of R.W. was a credentialing decision regarding his
12 suitability as a nursing student. *ECF No. 285, pg. 18*. This is a severe misreading of
13 what professional “certification” describes. As explained in *Oyama*, professional
14 certification means the school’s evaluation of the substantive content of a student’s
15 academic work. *Oyama*, 813 F.3d at 866-67. Understandably, grading a student and
16 ultimately determining whether the student has demonstrated sufficient aptitude
17 requires evaluation of the content of student’s speech, whether oral or written. *See*
18 *id.* at 867 (citing *Axson–Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)). The
19 First Amendment largely does not prevent state actor teachers from discriminating
20 against students who provide subjectively deficient answers in response to
21 coursework, absent an impermissible motive. *Id.*



As applied to the case before the Court, there is no serious argument that R.W.'s speech was curricular in nature. R.W. did not write about his aberrant thoughts in his response to a written assignment. R.W. did not answer an oral question in class by talking about his violent ideations. R.W. talked to his physician about his violent ideations at his physician's office in the context of seeking medical treatment. The court's decision in *Oyama* does not support Defendants' decision to find R.W. responsible for engaging in misconduct and imposing sanctions upon him. The Court should conclude that the student speech doctrine does not apply in higher education and conclude summary judgment on the issue of liability is appropriate.

C. R.W.'s Disclosure Of Violent Ideations To Appropriate Medical Providers For The Purpose Of Treatment Does Not Constitute A True Threat.

The Court should conclude that R.W.'s speech to his medical providers seeking treatment for violent ideations does not constitute a threat and cannot be considered an unprotected true threat under the First Amendment. A threat is "an expression of an intention to inflict evil, injury, or damage on another." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (quoting *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir.1989)). True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). While the specific



1 motive behind the speech may vary, a threat is for the purpose of making a person
2 fearful of physical harm for reasons such as intimidation or coercion. *Planned*
3 *Parenthood of Columbia/Willamette*, 290 F.3d at 1090 (citing *NAACP v. Claiborne*
4 *Hardware Co.*, 458 U.S. 886, 910 (1982)).

6 To demonstrate the definition of a “threat” as set forth in *Black* and *Planned*
7 *Parenthood* as well as the subjective scienter requirement under *Counterman*, the
8 Court should contrast the facts in this case with the facts of a decision cited
9 previously by Defendants in regard to the disability discrimination claims, *Mayo v.*
10 *PCC Structural, Inc.*, 795 F.3d 941, 942 (9th Cir. 2015). In *Mayo*, Timothy Mayo
11 was an aircraft parts welder who believed his supervisor was bullying him and
12 making his work life miserable. *Id.* Mayo made comments to at least three employers
13 regarding the supervisor. He told one employee he felt like bringing a shotgun to
14 work and blowing off the head of the supervisor, but explained to the other employee
15 that she need not worry because Mayo would do this on a shift when she wasn’t
16 working. *Id.* Mayo told another employee multiple times he planned to come to work
17 during the day shift to take out the managers. *Id.* Mayo told a third co-worker that
18 he wanted to bring a gun to work and start shooting people and that he would do so
19 at 1:30pm because that is when the supervisors have their walk-throughs. *Id.* When
20 law enforcement asked Mayo if he planned to go to work and start shooting people,
21 Mayo responded “not tonight.” *Id.* at 943. Throughout the decision concluding that
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1 the employer did not violate Mayo's rights as a disabled individual, the court
2 correctly identifies these statements as threats. *Id.* at 944-47.

3 Applying the definition of threat *Planned Parenthood of*
4 *Columbia/Willamette, Inc.* to the facts in *Mayo*, the opinion demonstrates that
5 Mayo's speech was an expression of intention to inflict injury to his supervisor.
6 *Planned Parenthood*, 290 F.3d at 1075; *Black*, 538 U.S. at 359; *Mayo*, 795 F.3d at
7 942. The motivation for Mayo's speech appears to have been a desire to engage in
8 retribution against the supervisor for bullying him and making his life miserable.
9 *Mayo*, 795 F.3d at 940; 942.

10 Under the subjective component of true threats set forth in *Counterman*,
11 Mayo's speech to his co-workers demonstrates a conscious disregard for the fact that
12 the speech would put them in fear not only for the supervisor's life, but that they
13 could get caught in the line of fire. *Counterman*, 600 U.S. at 79; *Mayo*, 795 F.3d at
14 942. According to the Defendants in this case, there is no substantive distinction
15 between actions surrounding Mayo's speech and R.W.'s speech.

16 When Mayo suffered from violent ideations regarding his supervisor, he told
17 multiple employees that he wanted to shoot his supervisor with a gun. Mayo did not
18 appear to express that these thoughts were undesirable or indicate that he was
19 seeking medical intervention to treat these manifestations of his mental illness.



1 In contrast, R.W. realized that he was having aberrant thoughts in the context
 2 of insomnia during a period of time where he was experiencing frequent epileptic
 3 seizures. *ECF No. 37-24, pg. 5; ECF No. 37-12, pg. 1.* R.W. contacted his primary
 4 care physician to seek treatment for these symptoms. *ECF No. 37-12, pg. 1.* In the
 5 week between R.W. recognizing these symptoms and being able to see his physician,
 6 R.W. did not take any actions in furtherance of these aberrant thoughts and did not
 7 mention them to anyone at CBC or elsewhere. *ECF No. 37-12, pg. 1; ECF No. 37-*
 8 *8, pgs. 6; 14; ECF No. 37-25, pg. 1; ECF No. 37-26, pg. 3.* It is also worth noting
 9 that it is only counsel for Defendants who is attempting to argue that R.W.’s speech
 10 to his medical providers constituted a threat and that R.W. was sanctioned based on
 11 threats of violence. Defendants themselves admitted that the speech was not
 12 punished as a threat of violence. *ECF No. 54-2, pgs. 12-13.*² There is no evidence to
 13 support the proposition that R.W.’s speech to his medical providers was undertaken
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 19 ² While Defendants have argued that R.W.’s speech was not a threat for the purposes
 20 of the student code of conduct while remaining a true threat for the purposes of First
 21 Amendment analysis, *ECF No. 294, pg. 8*, it is worth noting that “threats” is not a
 22 defined term within Wash. Admin. Code § 132S-100. It would be strange indeed for
 23 the colloquial definition of threat to be less expansive than the Constitutional test for
 24 true threats.
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1 in a manner where he was consciously disregarding the prospect that this speech
2 would cause imminent fear of harm to his teachers. His speech was not reflecting an
3 intention to inflict evil upon another, but a desire to seek medical treatment to
4 alleviate the aberrant thoughts.
5

6 In protest of the Supreme Court in *Counterman* acknowledging the
7 requirement of a subjective scienter for a true threat, Defendants ask this Court not
8 to apply the case retroactively and instead restrain itself to the Ninth Circuit's
9 previous expression of uncertainty whether a true threat requires a subjective
10 scienter in the civil context.³ *ECF No. 294*, pg. 8. The Ninth Circuit has expressed
11 such uncertainty. *See e.g. Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 746 (9th Cir.
12 2021); *Boquist v. Courtney*, 32 F.4th 764, 781 n. 6. (9th Cir. 2022). However, the
13 criminal/civil distinction is not supported by Supreme Court case law. As noted in
14 the *Counterman* decision itself, the Supreme Court appears to reject such a
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19 ³ Constitutional decisions and retroactivity only apply in the context of monetary
20 damages claims and qualified immunity as the inquiry is whether the law was
21 "clearly established at the time of the" alleged Constitutional infringement. *See*
22 *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Because the claim before the Court
23 is for prospective injunctive relief, retroactivity of the *Counterman* decision is not a
24 relevant consideration.
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1 distinction. *See Counterman*, 600 U.S. at 76. “But still, the First Amendment
2 precludes punishment, whether civil or criminal, unless the speaker's words were
3 ‘intended’ (not just likely) to produce imminent disorder.” *Id.* (citing *Hess v.*
4 *Indiana*, 414 U.S. 105, 109 (1973) (emphasis added)). Following this explanation of
5 incitement, the decision provides that “[t]he same reasoning counsels in favor of
6 requiring a subjective element in a true-threats case.” *Counterman*, 600 at 77
7 (emphasis added). The Supreme Court does not recognize a civil/criminal distinction
8 for true threats analysis and neither should this Court. Because R.W.’s speech does
9 not constitute a true threat, the Court should conclude that Defendants violated
10 R.W.’s rights under the First Amendment.
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14 IV. CONCLUSION

15 Defendants’ position in this case is a version of the politician’s syllogism.
16 Something must be done. This is something. Therefore, the something that we did
17 must be permissible. While this reasoning may support government action in
18 numerous other contexts, the First Amendment prevents the government from taking
19 adverse action against a person based on their speech except in narrow
20 circumstances. “The First Amendment itself reflects a judgment by the American
21 people that the benefits of its restrictions on the Government outweigh the costs.”
22 *United States v. Stevens*, 559 U.S. 460, 470 (2010). Here, it is undisputed that
23 Defendants undertook adverse actions against R.W. based on his speech. The
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1 conclusion that R.W.'s speech to his medical providers in the context of seeking
2 medical treatment is unprotected would be a stunning expansion of the state's ability
3 to regulate and chill speech. It is without precedent. As a result, the Court should
4 grant the motion for summary judgment and conclude that Defendants violated
5 R.W.'s rights under the First Amendment as a matter of law.
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9 DATED this 1st day of April, 2024.

10
11 *s/Bret Uhrich*

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of January 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Nicholas Ulrich: nicholas.ulrich@atg.wa.gov

s/ Bret Uhrich

Bret Uhrich

